

Consumer Electronics Retailers Coalition
Best Buy, Circuit City, Good Guys, IMRA, NARDA, NRF,
RadioShack, Ultimate Electronics

March 21, 2001

VIA ECFS

Mr. William F. Caton
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, D.C. 20554

**Re: *Ex Parte* Presentation; Commercial Availability of Navigation Devices,
 CS Docket 97-80**

Dear Mr. Caton:

This is to notify the Office of the Secretary that on March 20, 2002, the Consumer Electronics Retailers Coalition ("CERC") made *ex parte* presentations to Catherine Bohigian, Rick Chessen, Susan Eid, Kenneth Ferree, Jonathan Levy, Amy Nathan, Robert Pepper, and Alan Stillwell. Steve Cannon, General Counsel, Circuit City; Miles Circo, CTO, Circuit City; Jim Goldberg, Counsel, North American Retail Dealers Ass'n; Itchy Popkin, Furniture Fair, Jacksonville, North Carolina (NARDA); Paula Prah, V.P., Best Buy; Arnold Grothues, V.P., RadioShack; and Bob Schwartz, McDermott, Will & Emery attended on behalf of CERC. CERC has attached a copy of a written presentation that discloses the matters discussed during the meetings.

In accordance with Section 1.1206 of the Federal Communications Commission rules, this letter is provided to your office. A copy of this notice has been sent to the Commission employees listed above.

Very truly yours,

/s/ Robert S. Schwartz

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Re FCC CS Docket 97-80 March 19-20, 2002

It's been almost ...

Six years since Congress passed **Section 304** of the 1996 Telecommunications Act, requiring the FCC to assure the competitive commercial availability of any device necessary to receive any service offered by a Multichannel Video Program Distributor.

Four years since the Commission issued its **regulations** in CS Docket 97-80, requiring cable MSOs to support the attachment and functioning of digital cable-ready navigation devices, including DTV receivers.

Two years since **July 1, 2000** -- the date set in Commission regulations for cable MSOs to support the attachment and operation of digital cable-ready navigation devices, including DTV receivers.

One year and a half since the Commission launched its **"Year 2000 Review,"** to determine why there were no competitive commercial devices in the market, especially **no cable-ready DTV receivers or innovative, multi-function set-top boxes.**

Despite Congress's instruction to the FCC to assure competitive commercial availability, nothing useful to consumers has occurred. This is because it is still approximately:

Five years since MSOs began sharing analog set-top revenues with their leasing customers, to subsidize the rollout of 25 million digital set-top boxes, pursuant to a Telecommunications Act provision aimed at accelerating the DTV transition. Yet no MSO has committed to equal treatment for any customer that chooses to **buy** a competitive commercial product, such as an HDTV receiver. Thus, MSOs discriminate against customers for cable-ready DTV receivers, as well as for competitive products generally.

Three years before MSO leased devices must rely on any of the same technical standards as competitive commercial devices.

Two years that the *secret "PHILA" license* has remained unacceptable to every manufacturer of DTV receivers.

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Why Action On Navigation Devices Is
The Key To The DTV Transition

Seventy percent of all television households rely on cable, not antennas, to receive video news, sports and entertainment. About 25 million leased, incompatible cable set-top boxes have been shipped since the 1998 Report & Order. Clearly consumers are receptive to digital transmission, but:

- Consumers are frustrated by incompatibilities as to HDTV.
- Consumers buying DTV receivers today must rely on an interface in danger of being shut off or reduced in resolution in the future.
- Consumers, nevertheless, have bought 2.5 million DTV displays, and sales are increasing as prices fall. Sources of content have not kept pace -- primarily due to signal distribution issues. Cable consumers will not invest in DTV tuners reliant on antennas.
- Solving the problem by forcing DTV tuners into displays causes 85% of the population to pay for redundant hardware that is beneficial, at best, to the other 15%.
- Consumers want DTV receivers and new, multi-function, innovative products that will work directly and reliably with their means of signal acquisition -- which, for 70 percent, is a direct connection to the cable already in their home. Consumers then will have no worries about interfaces, incompatibilities, copy protection interruptions, or juggling of remote controls.
- Consumer electronics manufacturers are ready to enter the DTV market with paradigm-breaking, popular products -- DTV receivers that work directly on cable systems, and multi-function home entertainment units -- but have been frustrated by CableLabs' abuse of the public trust delegated to it by the FCC.

For several years, CERC has requested the opportunity to confront cable industry representatives at the FCC, to address directly and specifically the remaining obstacles to giving consumers what they want. Thus far, however, every multi-industry "hoe-down" has excluded CERC and its members.

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Why Vendors Still Cannot Offer
OpenCable Reliant Products

When the FCC was formulating its 1998 regulations, NCTA and CableLabs offered to devise specifications to support entrants' right to attach. The FCC accepted, subject to review in the year 2000. The Commission set 2005 as the date for reliance by MSO leased devices on standards developed for competitive entrants, subject to possible acceleration if competition did not bloom.

Since 1998 Cable MSOs have leased 25 million boxes to consumers without relying on any of the specifications they are developing for competitive entrants. Meanwhile, these potential entrants -- particularly those wishing to enter via a cable-ready DTV receiver or innovative multi-function product -- have suffered through ever-shifting obstacles, and are no closer to coming to market than they were in 1998. The main reasons are:

- **The "OpenCable 2000" specification** -- CableLabs and NCTA assured the Commission that their first set of specifications were adequate to meet the industry's July 1, 2000 attachment obligations. But, having given this assurance, CableLabs now (1) refuses to finish testing or consider necessary modifications, and (2) insists that **compliance with this standard alone is insufficient**, and the additional, unfinished "OCAP" standard must also be included in any certified product.
- **The "OCAP" specification** -- the ultimate hope for devices that are the equal of MSO-leased devices. MSOs refuse to recognize any obligation to support this standard, and refuse to commit to relying on it in their own leased products. It is written so as to discriminate against competitive, multi-function products, and to impose **"selectable output control"** on consumers. Manufacturers see it as at least three years away from implementation in products.
- **The "PHILA" license** -- after two years, no consumer electronics or information technology manufacturer has signed it. The only change in the last year is that its terms have become "secret" and can no longer be discussed publicly.

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Problems With The OpenCable 2000 Specification

While the "July 2000" specification will not, alone, support fully interactive, portable operation of products, it could still be the basis for innovative, multi-function products that differ in other ways from the leased offerings of MSOs. But it **appears CableLabs has withdrawn cooperation from manufacturers as to this specification:**

- CableLabs and NCTA continue to insist that the non-OCAP specification was adequate to satisfy its July 1, 2000 obligation to support attached devices, but CableLabs now tells CE manufacturers that reliance on this specification alone is *not* adequate for certification of a new product.
- Crucial testing, requested by manufacturers, has not been performed by CableLabs.
- Manufacturer requests for small changes, so as to enable Impulse Pay Per View ("IPPV") through competitive products, have been pending for years but not performed.
- CableLabs certification fees and requirements are arbitrary and unreasonable.

What The FCC Can Do To Cure Them

In finally acting in its "Year 2000 Review," the FCC should:

- Insist that compliant products be testified and certified for use, or impose sanctions for failure to meet the July 1, 2000 deadline.
- Review and oversee the OpenCable testing and certification program -- the power to set specifications to comply with the FCC regulations in this Docket was delegated to CableLabs by the FCC.
- Require that pending enhancements requested by manufacturers be implemented.
- Establish priority deadlines for CableLabs support of non-OCAP navigation devices, as standalone products, and bases for later "stepup" OCAP models. Enable competitive entry, at last.

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Problems With The OCAP Specification

The "Open Cable Access Platform" ("OCAP") could establish a level playing field for all products, as consumers enjoy in the market for telephone customer premises devices. Yet now that OCAP version 1.0 is public, manufacturers point to serious discrimination against multi-function products. They also believe it will be years before a reliable specification will be available:

- A "middleware" solution should support both downloaded applications and applications native to the device. OCAP, however, provides for a "hall monitor" application that **restricts or disallows functions or features resident in the device**. Imagine if a web browser disabled many or most PC functions! (Similar to the monopolization alleged re Microsoft as to Netscape, but from the "headend" rather than the "operating system" side.)
- When a device-supplied application, such as a program guide, is allowed to run, it might not be supported because in some respects MSO systems are still designed for proprietary protocols only.
- OCAP will not be deemed reliable by manufacturers until stable, and devices distributed by cable MSOs **also** rely on it. **Reliability** in consumer hands, in a new product category, is a huge issue for consumer electronics manufacturers -- consumers will accept a PC that locks up several times a day, but not a home entertainment unit that does so.

What The FCC Can Do To Cure Them

In its Year 2000 Review the FCC should:

- Adopt CERC's pending proposed amendment to require by **January 1, 2003**, that MSO devices **rely on the set of specifications made available to competitive entrants**. Otherwise, CableLabs can keep these specifications in a perpetual state of unreliability.
- Through amendment and oversight, require that the OCAP specification **abandon selectable output control** and **not discriminate** against competitive, integrated products, such as multi-function set-top boxes and DTV receivers.

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Problems With The PHILA License

CableLabs offered to the FCC in 1997 to devise a specification to address security obstacles, to comply with Section 304. The "POD-Host Interface" puts MSO security functions in the "POD" module, and all non-MSO specific functions in the competitive "host." MPAA later requested that security measures also be imposed across the POD-Host interface -- requiring that competitive devices be licensed to decrypt signals. CableLabs has molded this delegation of FCC implementation into a monopolist's contract of adhesion, so as to:

- over-reach as to licensees' IP (e.g., grant-back), require mandatory adherence to **all** CableLabs specifications, and impose unreasonable liability on entrant manufacturers;
- through OCAP, impose **selectable output control and signal downresolution**, and copy control in ways not required of MSO-leased devices **and lately disclaimed by the motion picture industry**;
- forestall entry by refusing to negotiate in good faith; demanding of potential licensees a "non-disclosure agreement" so as to (1) avoid airing of public policy issues, and (2) make it impossible for a manufacturer to petition the FCC as to any specific license issue, as referenced in the FCC's September 2000 Declaratory Order.

What The FCC Can Do To Cure Them

- The stalemate as to PHILA can be broken only by the FCC acknowledging that (1) CableLabs, in offering PHILA, is fulfilling a trust originating in the Congress and delegated by the FCC, and (2) the issues it raises are every bit as much of public concern as was the RJ11 license when telephone equipment was deregulated.
- CableLabs cannot claim antitrust immunity for exercising a delegated power, yet disclaim any responsibility to public discourse. Motion picture industry congressional testimony in the last week has changed key PHILA underpinnings. The FCC must publish the current draft of PHILA and require all interested parties to take clear, public, positions of record.

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CERC Summary

For the DTV transition to succeed, and for competitive multi-function set-top boxes to be made available at retail, competitive entrant manufacturers must be offered product standards on which they can rely, so as to justify the investment and risk of manufacturing and selling new, innovative classes of products that include, but are by no means limited to, DTV receivers. The cable industry in 1997 offered to establish such standards, but has not been held accountable by the FCC for clear, documented failures, refusals, and evasions. While much good has been accomplished, **a chain with 99 good links and one broken one still cannot be relied on for support.** The FCC has never required that all links be sound.

CERC's pending amendments address the major disincentives to forging reliable support for innovative, multi-function DTV products, including set-top boxes and other devices:

(1) Require MSO products also to rely on the OpenCable suite of specifications by 2003 -- **so as finally to assure their reliability.**

(2) Stop officially discriminating against competitive entry -- allow a leased box customer to choose a POD-enabled set-top box, DTV product, or other multi-function device **without losing his or her "analog neighbor subsidy."**

Additionally, there are glaring obstacles to competitive entry that a determined FCC must sweep away through oversight:

(a) PHILA must be resolved in good faith, rather than as a monopolist's take-it-or-leave-it price for executing a public trust.

(b) CableLabs must establish reasonable, non-arbitrary product certification policies.

(c) The "OpenCable 2000" specifications must be completed rather than abandoned by CableLabs.

(d) The OCAP specification must be rid of discrimination against non-MSO, multifunction devices.

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CERC's Offer

CERC is willing to meet at any time, in the presence of cable representatives, to help the Commission define, discuss, and accomplish these objectives.